

APPEAL NO. 172403
FILED DECEMBER 13, 2017

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on September 6, 2017, in (city) Texas, with (administrative law judge) presiding as the administrative law judge (ALJ). The ALJ resolved the disputed issues by deciding that: (1) the respondent (claimant) reached maximum medical improvement (MMI) on June 30, 2017; (2) the claimant's impairment rating (IR) is five percent; and (3) the claimant had disability resulting from the compensable injury from (date of injury), through June 30, 2017, but not before and not thereafter. The appellant (carrier) appeals the ALJ's determinations of MMI, IR and disability. The carrier contends that the ALJ erred because she did not adopt the certification of MMI/IR from the designated doctor and that the claimant failed to meet her burden to prove any disability. The appeal file does not contain a response from the claimant.

DECISION

Affirmed in part and reversed and remanded in part.

The parties stipulated, in part, that the claimant sustained a compensable injury on (date of injury); the carrier has accepted a low back sprain/strain as the compensable injury; and that the Texas Department of Insurance, Division of Workers' Compensation (Division) appointed (Dr. M) as designated doctor on the issues of MMI and IR. The claimant testified that she injured her back while pushing up on a trailer door of a truck.

DISABILITY

The ALJ's determination that the claimant had disability resulting from the compensable injury from (date of injury), through June 30, 2017, but not before and not thereafter is supported by sufficient evidence and is affirmed.

MMI/IR

Section 401.011(30)(A) defines MMI as "the earliest date after which, based on reasonable medical probability, further material recovery from or lasting improvement to an injury can no longer reasonable be anticipated." Section 408.1225(c) provides that the report of the designated doctor has presumptive weight, and the Division shall base its determination of whether the employee has reached MMI on the report of the designated doctor unless the preponderance of the other medical evidence is to the contrary. Section 408.125(c) provides that the report of the designated doctor shall

have presumptive weight, and the Division shall base the IR on that report unless the preponderance of the other medical evidence is to the contrary, and that, if the preponderance of the medical evidence contradicts the IR contained in the report of the designated doctor chosen by the Division, the Division shall adopt the IR of one of the other doctors. 28 TEX. ADMIN. CODE § 130.1(c)(3) (Rule 130.1(c)(3)) provides that the assignment of an IR for the current compensable injury shall be based on the injured employee's condition as of the MMI date considering the medical record and the certifying examination.

There are five certifications of MMI/IR in evidence. (Dr. S) examined the claimant on the date of the compensable injury and certified that the claimant reached MMI on that date with no permanent impairment. Dr. S assessed lumbar pain as the only diagnosis.

Dr. M, the designated doctor, initially examined the claimant on March 23, 2016, and certified that the claimant had not reached MMI. Dr. M listed the following diagnoses: strain of muscle, fascia and tendon, lower back, and sprain of ligaments of the thoracic spine. Dr. M noted that the claimant was currently undergoing physical therapy and chiropractic sessions with her primary treating doctor. Dr. M subsequently examined the claimant on September 2, 2016, and certified that the claimant reached MMI on August 16, 2016, and assigned a five percent IR using the Guides to the Evaluation of Permanent Impairment, fourth edition (1st, 2nd, 3rd, or 4th printing, including corrections and changes as issued by the American Medical Association prior to May 16, 2000) (AMA Guides). Dr. M considered and rated a lumbar strain and a thoracic strain. Dr. M assessed zero percent impairment for the lumbar spine, placing the claimant in Lumbosacral Diagnosis-Related Estimate (DRE) Category I: Complaints or Symptoms and five percent impairment for the thoracic spine, placing the claimant in Thoracolumbar DRE Category II: Minor Impairment. Dr. M stated that the claimant has received conservative care measures consisting of chiropractic sessions, physical therapy, and analgesic medication, activity modification, and lumbar facet blocks which have allowed the claimant to reach MMI because her condition has remained relatively stable. Dr. M further noted that her evaluation dated August 16, 2016, noted a worsening of symptoms but that her worsened symptoms have since subsided because of her recent physical therapy which focused more on her thoracic region.

There were also two certifications from (Dr. J), a referral doctor acting in place of the treating doctor. Dr. J examined the claimant on January 23, 2017, and certified that the claimant had not yet reached MMI stating there were still treatment options available and that the claimant would benefit from a chronic pain management program. Dr. J listed the following diagnoses in his narrative report: lumbar sprain/strain, thoracic sprain/strain, and lumbar facet syndrome.

Dr. J examined the claimant again on August 11, 2017, and certified that the claimant reached MMI on June 30, 2017, and assigned a five percent IR. Dr. J listed the compensable injuries as follows: lumbar sprain/strain, thoracic sprain/strain, and lumbar facet syndrome. Dr. J explained that the claimant reached MMI on June 30, 2017, because this was the date of her last session of the approved chronic pain program and her condition became static at that point. Dr. J assessed five percent impairment for the thoracic spine. Dr. J did not specifically identify the DRE spinal region in which he placed the claimant for the thoracic spine. For the lumbar spine, Dr. J stated that the thoracolumbar spine meets the criteria for a DRE Category I and assigned zero percent impairment. Dr. J stated that these impairments are combined resulting in a five percent whole person impairment.

In Appeals Panel Decision (APD) 051306-s, decided August 3, 2005, the Appeals Panel applied this language and held as follows:

Applying the language from the bottom of page 3/95 of the AMA Guides, if the injury is primarily to the cervical spine the rating would be under part 3.3h, page 3/103 cervicothoracic spine impairment, if the injury was primarily to the thoracic area of the spine the rating would be under part 3.3i page 3/106 for thoracolumbar spine impairment and if the injury is primarily to the lumbar portion of the spine, the impairment would be under part 3.3g page 3/101 lumbosacral spine impairment. Pursuant to part 3.3f, page 3/101, paragraph 8, if more than one spine region is impaired, the doctor is to determine the impairment of the other regions and combine the regional impairments using the Combined Values Chart to express the patients total spine impairment.

Although the parties stipulated that the claimant sustained a compensable injury and that the carrier has accepted a low back sprain/strain as the compensable injury, the specific nature of the compensable injury was not described in the stipulation. Dr. M considered and rated only lumbar and thoracic strains and the treating doctor referral, Dr. J, rated thoracic and lumbar sprains/strains. Dr. J additionally considered lumbar facet syndrome. Accordingly, we reverse the ALJ's determinations that the claimant reached MMI on June 30, 2017, with a five percent IR. We remand the issues of MMI and IR to the ALJ for further action consistent with this decision.

SUMMARY

We affirm the ALJ's determination that the claimant had disability resulting from the compensable injury from (date of injury), through June 30, 2017, but not before and not thereafter.

We reverse the ALJ's determination that the claimant reached MMI on June 30, 2017, and remand the issue of MMI to the ALJ for further action consistent with this decision.

We reverse the ALJ's determination that the claimant's IR is five percent and remand the IR issue to the ALJ for further action consistent with this decision.

REMAND INSTRUCTIONS

As mentioned earlier, the parties stipulated that the carrier has accepted a low back sprain/strain as the compensable injury. The certifications of MMI and IR in evidence include conditions of which the compensability was neither stipulated to nor litigated. The ALJ is to clarify with the parties the exact nature of the compensable injury of (date of injury), either by stipulation or based on the evidence presented at the CCH. Thereafter, if a certification of MMI and IR in evidence is adoptable that considers and rates the entire compensable injury, the ALJ is then to make a determination on the issues of MMI and IR.

If necessary, the ALJ is to inform the designated doctor what injuries are included in the compensable injury of (date of injury). The ALJ is to request the designated doctor to give an opinion on the claimant's date of MMI and rate the entire compensable injury in accordance with the AMA Guides, and considering the medical record and the certifying examination.

The parties are to be provided with the ALJ's letter to the designated doctor and the designated doctor's response. The parties are to be allowed an opportunity to respond.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the ALJ, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Division, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. See APD 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **LIBERTY MUTUAL CORPORATION** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
211 EAST 7TH STREET, SUITE 620
AUSTIN, TEXAS 78701.**

Margaret L. Turner
Appeals Judge

CONCUR:

K. Eugene Kraft
Appeals Judge

Carisa Space-Beam
Appeals Judge